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APPELLANT PRO SE:

ERIC D. SMITH
Westville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELIZABETH ROGERS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ERIC D. SMITH,

Appellant-Plaintiff,

VS.

DEPARTMENT OF CORRECTION, et al.,

Appellee-Defendant.

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No. 49A05-0603-CV-113

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth Johnson, Judge
Cause No. 49D02-0510-PL-42740

August 21, 2006

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-plaintiff Eric D. Smith appeals from the trial court's order granting appellee-defendant Indiana Department of Correction's (DOC) motion for judgment on the pleadings. In particular, Smith alleges that he sufficiently stated claims under the Indiana and United States Constitutions and a negligence claim against the DOC. Finding no error, we affirm the judgment of the trial court.

FACTS

On November 19, 2004, Smith, an inmate at the Westville Correctional Facility (Westville), filed an initial grievance, complaining that on November 18, he had noticed a "painful odor" that caused him extreme pain, discomfort, a sense of panic, and made it difficult to breathe. Appellant's App. p. 20. The Westville staff informed Smith that everyone at the facility is subjected to the same fumes and denied Smith's requested remedy.

On December 1, 2004, Smith filed a second grievance, again complaining about the odor and questioning whether everyone at the facility was in danger from the fumes. Smith also questioned whether the "gas" could cause future problems for the individuals exposed to it. Id. p. 21. In response, the Westville staff informed Smith that the odor was likely emanating from a nearby water treatment plant, suggesting that if Smith wanted the Board of Health to investigate, he should contact that department.

On December 3, 2004, Smith appealed the denial of his grievance to the grievance committee and requested the "name and address of where those fumes are coming from." Id. p. 22. Additionally, Smith complained that the person or entity causing the fumes was polluting the air and putting everyone in danger. He also alleged that he suffered pain from

the fumes. He requested that Westville do a better job of ventilating his cell and stated that the prison was being negligent in protecting him. In response, Westville denied Smith's appeal, informing him that the sewage plant shared by Westville and the Maximum Control Facility were following the guidelines in controlling the waste and fumes and that the fumes usually dissipated before reaching Westville.

On December 15, 2004, Smith appealed the denial of his grievance by the grievance committee to the superintendent, complaining that the fumes caused him pain, caused his eyes, skin, nostrils, and lungs to burn, and caused him to have difficulty breathing. The superintendent denied Smith's appeal. The Westville staff instructed Smith to submit a healthcare request to address the medical problems he was allegedly suffering as a result of the fumes. Smith never sought medical treatment for his alleged medical problems.

On February 2, 2005, the Indiana Department of Environmental Management (IDEM) issued a particle pollution alert to sensitive populations in LaPorte County. On May 9, 2005, Smith filed a tort claim notice with the Office of the Indiana Attorney General, claiming that Westville, the DOC, and the unknown plant were negligent because they took no actions to prevent the fumes from causing Smith pain.

On October 31, 2005, Smith filed a complaint for damages naming the DOC, Westville, the mayor of Westville, and the unknown plant as defendants, alleging that the defendants had violated his rights under the Indiana and United States Constitutions. On January 20, 2006, the DOC filed a motion for judgment on the pleadings with an accompanying memorandum, alleging that Smith had failed to state a claim upon which relief

could be granted pursuant to either the Indiana or United States constitutions. On January 30, 2006, the trial court granted the DOC's motion.¹ Smith now appeals.

DISCUSSION AND DECISION

Smith argues that the trial court erred in granting the DOC's motion for judgment on the pleadings because he sufficiently pleaded claims pursuant to the Indiana and United States Constitutions and a negligence claim against the DOC. As we consider Smith's arguments, we observe that we apply a de novo standard of review to a trial court's ruling for a motion for judgment on the pleadings pursuant to Indiana Trial Rule 12(C). Hispanic College Fund, Inc. v. Nat'l Collegiate Athletic Ass'n, 826 N.E.2d 652, 655 (Ind. Ct. App. 2005), trans. denied. Such a motion should be granted only when it is clear from the pleadings that the nonmovant cannot in any way succeed under the facts and allegations contained therein. Id. We look solely at the pleadings and accept all well-pleaded facts as true. Id. The movant is deemed to have admitted those facts in favor of the nonmovant, and we will draw all reasonable inferences in the nonmovant's favor. Id.

I. Indiana Constitution

Turning first to Smith's claims under the Indiana Constitution,² we observe that on appeal, Smith argues that the DOC violated his rights under Article 1, Sections 15 and 16.

¹ Smith filed a response to the DOC's motion on January 30, 2006.

² The State argues that Smith does not have a private right of action under the Indiana Constitution to pursue a claim for damages. This issue has never been squarely addressed by a court of this State, and very recently, our Supreme Court expressly declined to address it in a different context. See Cantrell v. Morris, 849 N.E.2d 488 (Ind. 2006) (holding that a public employee's wrongful discharge claim was governed by the Indiana Tort Claims Act and expressly declining to consider whether a private right of action for damages exists under Article I, Section 9 of the Indiana Constitution). We will assume, for argument's sake only, that Smith has a

Article 1, Section 15 provides that “[n]o person . . . confined in jail, shall be treated with unnecessary rigor.” Our Supreme Court has described past instances that are typical violations of Section 15:

cases recognizing violations of Article 1, Section 15 involve situations where a prisoner was tortured, had a tooth knocked out, was repeatedly beaten, kicked, and struck with a blackjack and beaten with a rubber hose while he was stretched across a table, where a prisoner was beaten with police officers’ fists in both eyes, cut on the top of his head, and beaten with a rubber hose on the head and ears, and where a prisoner was severely injured after being shot by police during a protest.

Ratliff v. Cohn, 693 N.E.2d 530, 534 (Ind. 1998) (citations omitted). Thus, past situations in which a violation of Section 15 has been found involved the severe physical abuse of inmates.

Here, in contrast, Smith’s chief complaints are that he was exposed to “painful odors,” appellant’s app. p. 20, and that “it is not necessary to pollute the air in order to treat contaminated water,” appellant’s br. p. 10. Moreover, Smith alleges no serious or long-lasting health problems arising from his exposure to the odors, and, indeed, he has never sought medical treatment for his alleged health problems. It is apparent, therefore, that Smith’s alleged injuries fall far short of those described in Ratliff. Under these circumstances, we conclude that the trial court properly concluded that Smith has failed to state a claim for a violation of Article 1, Section 15 of the Indiana Constitution.

Smith next argues that the trial court erred in dismissing his claim alleging a violation of Article 1, Section 16 of the Indiana Constitution. A punishment is held to be cruel and

right to pursue his state constitutional claims, inasmuch as we have concluded that he has not stated a claim

unusual in violation of Section 16 when it “makes no measurable contribution to acceptable goals of punishment, but rather constitutes only purposeless and needless imposition of pain and suffering.” Douglas v. State, 481 N.E.2d 107, 112 (Ind. 1985). Furthermore, “the constitutional prohibitions against cruel and unusual punishments . . . are proscriptive of atrocious or obsolete punishments” Wise v. State, 400 N.E.2d 114, 117 (Ind. 1980).

Smith argues that he sufficiently established a violation of Section 16 because his complaint stated that “the defendants caused him pain maliciously” and that his complaint and his grievances set forth the pain and suffering he endured. Appellant’s Br. p. 11. Smith has failed to establish, however, that he was subjected to atrocious or obsolete punishments by the prison staff or any DOC employee. Smith has also failed to establish that the prison staff or any DOC employee caused him any pain or suffering. Indeed, as noted above, Smith has alleged no serious health problems arising from his exposure to the odors, and he has never sought medical treatment for his alleged health problems. He offers no support for his assertion that exposure to odors emanating from a sewage plant—not controlled by the DOC—to which inmates and staff alike are exposed, constitutes cruel and unusual punishment. It is apparent, therefore, that the trial court properly granted the State’s judgment on the pleadings with respect to Smith’s claim under Article 1, Section 16 of the Indiana Constitution.

II. Federal Constitution

Smith next argues that he has sufficiently pleaded a claim pursuant to the Eighth Amendment to the United States Constitution. A private right of action under the Eighth Amendment is conferred by 42 United States Code section 1983, which provides that “[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . , shall be liable to the party injured in an action at law” (Emphasis added).

We have determined in the past, however, that a state agency is not a “person” who may be sued for damages under section 1983. Ross v. Ind. State Board of Nursing, 790 N.E.2d 110, 117 (Ind. Ct. App. 2003). We agree with the DOC that it is a state agency and, therefore, may not be sued for damages under section 1983. See Ind. Code §§ 11-8-2-1 et seq. (creating the DOC), -2 (providing that chairman of the DOC and seven Board members are appointed by the governor), -3 (providing that the Board performs all administrative functions, duties, and responsibilities for the DOC).

Propriety of suing the DOC pursuant to section 1983 notwithstanding, we observe that to succeed on an Eighth Amendment claim, the deprivation must be, objectively, sufficiently serious. Farmer v. Brennan, 511 U.S. 825, 834 (1994). Additionally, the inmate must establish that “the jail officials knew of a substantial risk of serious injury to the detainee but nevertheless failed to take reasonable measures to prevent that harm from occurring.” Henderson v. Sheahan, 196 F.3d 839, 845 (7th Cir. 1999).

Here, Smith failed to establish that he was subjected to any actual harm based upon the alleged exposure to air pollution. Although he complains that he suffered discomfort, a sense of panic, and trouble breathing, he did not seek medical treatment despite the superintendent's suggestion that he do so. Moreover, Smith has not established that jail officials knew of a substantial risk of serious injury yet failed to protect him, inasmuch as all of the inmates and prison employees were exposed to the odors. If the DOC employees had subjectively believed that there was a substantial risk of serious injury to those who were exposed to the odors—including themselves—then they may well have attempted to prevent that injury. Thus, Smith has failed to establish that he is entitled to relief under the Eighth Amendment, and the trial court properly granted the DOC's motion with respect to this claim.

III. Negligence

Finally, Smith argues that the trial court erred in granting the DOC's motion for judgment on the pleadings with respect to his negligence claim. To succeed on a negligence claim, a plaintiff must establish a duty owed to the plaintiff by the defendant, a breach of that duty, and an injury to the plaintiff proximately caused by that breach. Topp v. Leffers, 838 N.E.2d 1027, 1031-32 (Ind. Ct. App. 2005), trans. denied.

Here, Smith has wholly failed to support his allegations that the DOC caused or created the odors, thereby breaching its statutory duty to protect inmates. Ind. Code §§ 11-11-6-1, -2. Specifically, Smith sets forth no factual allegation regarding the manner in which the DOC or Westville polluted the air, nor does he allege that the DOC had any control over

the odors emanating from the unknown plant. Additionally, he does not allege that, even if the DOC had control over the odors, its failure to prevent him from being exposed to those odors breached its statutory duty pursuant to Indiana Code chapter 11-11-6. Thus, the trial court properly granted the DOC's judgment on the pleadings with respect to Smith's negligence claim.

The judgment of the trial court is affirmed.

SULLIVAN, J., and MAY, J., concur.